APPEAL NO. 031275
FILED JULY 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 23, 2003. The hearing officer determined that the appellant's (claimant) _____, compensable injury in the form of a low back injury and bilateral knee injury in the nature of bruises and contusions does not extend to include bilateral knee osteoarthritis or pes anserinus bursitis, and that the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter. The claimant appealed the extent-of-injury and SIBs determinations on sufficiency of the evidence grounds. The claimant further asserts that the hearing officer erred in adding the issue of impairment rating (IR) as it was not an issue certified out of the benefit review conference (BRC). The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that Dr. V was chosen by the Texas Workers' Compensation Commission (Commission) to act as designated doctor in this case; and that based on a 16% IR, the first quarter of SIBs was January 10 through April 10, 2003, and the qualifying period for the quarter was September 28 through December 27, 2002. Pursuant to a Benefit Dispute Agreement (TWCC-24) dated November 28, 2000, the carrier accepted a low back injury.

The claimant testified that she fell forward striking her knees and hands while climbing some stairs on _____. She further testified that after the fall she noticed bruising and blood on her knees. The claimant stated that she did not seek immediate medical treatment because although she had a lot of pain, she thought she could bear it. The claimant testified that she finally decided to seek medical treatment at the end of December 1999, when her condition progressed to the point that she began having falls. It was the claimant's testimony that she has experienced pain in her knees since sustaining the fall on _____.

Regarding the issue of extent of injury, both the claimant and the carrier presented substantial medical evidence to support their respective positions. After reviewing the medical evidence and the testimony of the claimant, the hearing officer determined that the claimant did sustain an injury to her bilateral knees in the form of bruises and contusions. However, the hearing officer determined that the compensable injury does not extend to or include the claimant's specific diagnoses of bilateral knee osteoarthritis and pes anserinus bursitis because neither was caused by the fall nor did they naturally result from the bruises and contusions sustained in the fall. The claimant had the burden to prove that the compensable injury extends to and includes her complained-of conditions. There is conflicting evidence in this case. The 1989 Act

makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The finder of fact may believe that the claimant has an injury or condition, but disbelieve that the injury occurred at work as claimed. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A fact finder is not bound by medical evidence where the credibility of that evidence is manifestly dependent upon the credibility of the information imparted to the doctor by the claimant. Rowland v. Standard Fire Ins. Co., 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Texas Worker's Compensation Commission Appeal No. 950084, decided February 28, 1995. Our review of the record reveals that the hearing officer's extent-of-injury determination is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Thus, no sound basis exists for us to disturb that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We next turn to the issue of the claimant's entitlement to first quarter SIBs. The hearing officer determined that the claimant is not entitled to first quarter SIBs because she did not have an IR of 15% or greater, and even if she did she failed to establish that she was totally unable to work in any capacity during the qualifying period for the first quarter.

Section 408.142(a) outlines the requirements for SIBs eligibility as follows:

> (a) An employee is entitled to [SIBs] if on the expiration of the impairment income benefits [IIBs] period computed under Section 408.121(a)(1) the employee:
>
> (1) has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
>
> (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
>
> (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
>
> (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) states that the "good faith" criterion will be met if the employee:

> has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the causes

a total inability to work, and no other records show that the injured employee is able to return to work[.]

On appeal, the claimant asserts that the hearing officer improperly decided the issue of what her IR is since it was not certified as an issue out of the BRC, and neither party requested that it be added as an issue. We do not agree. Having an IR of 15% or greater is an essential element of SIBs entitlement. Section 408.142(a)(1). In the absence of a stipulation by the parties, the claimant has the burden to establish all of the elements set out in Section 408.412(a) in order to show entitlement to SIBs. In the instant case, the carrier refused to stipulate that the claimant had an IR of 15% or greater and contended that the claimant's IR is 10% as was initially determined by Dr. V, so the burden was on the claimant to prove that she did have the required 15% or greater IR . Entitlement to SIBs cannot be shown in the absence of a finding that the IR is 15% or greater.

The claimant contends that she was "blindsided" because she first learned that the carrier was refusing to stipulate that her IR was greater than 15% on the date of the hearing. The ombudsman representing the claimant stated that she was unprepared to go forward on the issue of IR because she didn't know it was going to be in dispute. The hearing officer offered to withdraw the issue of SIBs entitlement but the claimant was anxious to get the issue resolved. Additionally, we note that the claimant did not request a continuance after she learned that IR was in dispute. As such, we cannot say that the hearing officer erred by considering the issue of IR in reaching his decision.

Based upon the documentary evidence in the record, on October 9, 2000, a Report of Medical Evaluation (TWCC-69) was submitted by Dr. M, who was, at the time, the Commission-selected designated doctor. In his report, Dr. M certified that the claimant was not yet at maximum medical improvement (MMI) and so he did not issue an IR. On February 7, 2002, Dr. D, who was a doctor acting on behalf of the claimant's treating doctor, submitted a TWCC-69 in which he certified that the claimant reached MMI on February 7, 2002, with a 20% IR. Dr. D used the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides, fourth edition). On March 13, 2002, Dr. V submitted a TWCC-69 in which he certified that the claimant reached MMI on February 7, 2002, with a 10% IR. Dr. V used the AMA Guides, fourth edition and awarded the 10% based upon a DRE Lumbosacral Category III. On March 28, 2002, Dr. V was sent a letter by the Commission instructing him to redo his certification using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides, third edition). On April 30, 2002, Dr. V submitted a TWCC-69 dated March 13, 2002, in which he certified that the claimant's IR is 16% using the AMA Guides, third edition.

The hearing officer determined that the AMA Guides, fourth edition was the proper edition to be used in this case, and that Dr. V's certification of a 10% IR under the fourth edition was not contrary to the great weight of the other medical evidence. We agree. Rule 130.1(c)(2)(B) states, in relevant part:

(B) The appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is:

(i) the fourth edition of the AMA Guides . . . ; or

(ii) the third, second printing, dated February 1989 if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001 which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision.

In the instant case, the first certification of MMI was made on February 7, 2002, therefore the AMA Guides, fourth edition is the appropriate edition to be used in this case. The only TWCC-69 in evidence prior to October 15, 2001, certified that the claimant was not at MMI. The claimant argues that Dr. V's amended certification of 16% under the AMA Guides, third edition, should be given presumptive weight pursuant

to Section 408.125(e). We do not agree because the Commission improperly directed Dr. V to use the AMA Guides, third edition, when the fourth edition should have been used and IRs assigned using the wrong edition of the AMA Guides shall not be considered valid. Rule 130.1(c)(2)(C).

We conclude by noting that even had the claimant shown that her IR was greater than 15%, the hearing officer's determination that the claimant failed to establish that she had a total inability to work in any capacity pursuant to Rule 130.102(d)(4) because she failed to submit a sufficient narrative report from her doctor and other records show that she had some ability to work during the qualifying period for the first quarter is supported by the evidence. Contrary to the claimant's assertion in her appeal, a Functional Capacity Evaluation can constitute an "other record" for purposes of Rule 130.102(d)(4).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **WESTERN INDEMNITY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

BOB MORRISON
820 GESSNER, SUITE 1000
HOUSTON, TEXAS 77024.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge